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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1966

No. 62

SAMUEL SPEVACK, *Petitioner*,

v.

SOLOMON A. KLEIN, *Respondent*.

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK

BRIEF FOR PETITIONER

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Opinions Below

The opinion of the Appellate Division of the Supreme Court of New York is reported at 24 App. Div. 2d 653. The memorandum order of the Court of Appeals, affirming the order of the Appellate Division, is reported at 16 N.Y. 2d 1048, 213 N.E. 2d 457. The order of the Court of Appeals amending its remittitur is reported at 17 N.Y. 2d 490, 214 N.E. 2d 373.

Jurisdiction

The judgment of the Court of Appeals was entered on December 1, 1965, and, on December 13, 1965, Mr. Justice Harlan entered a stay of the order of the Appellate Division conditioned upon the filing of a petition for certiorari on or before January 24, 1966. The petition was filed on January 24, 1966, and was granted on March 21, 1966. 382 U.S. 942. The jurisdiction of this Court rests on 28 U.S.C. 1257(3).

Questions Presented

1. Is the disbarment of an attorney, solely because of his refusal, based upon a good faith claim of the privilege against self-incrimination, to testify and to produce records before a State Judicial Inquiry, in violation of the self-incrimination clause of the Fifth Amendment, as applied to the States by the Fourteenth Amendment?

2. Assuming the Fifth Amendment standard does not of itself preclude the disbarment of an attorney under such circumstances, is the disbarment nonetheless arbitrary or discriminatory action prohibited by the due process or equal protection clauses of the Fourteenth Amendment?

3. May the protection of the self-incrimination clause of the Fifth Amendment be removed from the financial records of an attorney by a broad State regulation requiring that certain records be kept by attorneys?

Statutes Involved

The Fifth and Fourteenth Amendments to the Constitution of the United States provide, in pertinent part, as follows:

Fifth Amendment

> "No person . . . shall be compelled in any criminal case to be a witness against himself . . . ."

Fourteenth Amendment

"Section 1 . . . . nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

Rule 5 of the Special Rules of the Second Department, Appellate Division of the Supreme Court of the State of New York Regulating the Conduct of Attorneys and Counselors at Law in the Second Judicial Department, provided as follows:[1]

"Preservation of Records of Actions, Claims and Proceedings. In every action, claim and proceeding of the nature described in rule three [personal injury, property damage or condemnation claims involving contingent fee compensation], attorneys for all the parties shall preserve the pleadings, records and other papers pertaining to such action, claim and proceeding, and also all data and memoranda of the disposition thereof, for the period of at least five years after any settlement or satisfaction of the action, claim or proceeding or judgment or final order thereon, or after the dismissal or discontinuance of any action or proceeding brought."

Statement

In January 1957 the Appellate Division of the Supreme Court of New York, Second Department, in response to a petition of the Brooklyn Bar Association, ordered a Judicial Inquiry into alleged unethical practices relating to the representation of clients on a contingent-fee basis. The nature and procedures of the Judicial Inquiry have been described

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[1] Rule 5 was amended and renumbered as Special Rule IV(6) in 1961. See Civil Practice Annual of New York 9-26 (1965).

in this Court's opinions in *Anonymous* v. *Baker*, 360 U.S. 287, and *Cohen* v. *Hurley*, 366 U.S. 117. Generally, as the *Baker* and *Cohen* cases indicate, the Judicial Inquiry proceeded by serving subpoenas upon attorneys and other persons requiring their testimony and/or production of records, and examination of witnesses was conducted in secret and with attendance of counsel permitted only at the discretion of the presiding Justice.

For a number of years, the Second Department of the Appellate Division has had special rules regulating the conduct of attorneys who practice in personal injury, property damage and certain other types of actions under contingent fee arrangements. Among other things, the rules require the filing by such attorneys of statements of retainer setting forth the details of such arrangements[2] and the

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[2] "Statements as to Retainers in Actions or Claims Arising from Personal Injuries or Property Damage and in Condemnation or Change of Grade Proceedings—Blank Retainers. Every attorney who, in connection with any action or claim for damages for personal injuries or for property damage or for death or loss of services resulting from personal injuries, or in connection with any claim in condemnation or change of grade proceedings, accepts a retainer or enters into an agreement, express or implied, for compensation for services rendered or to be rendered in such action, claim or proceeding, whereby his compensation is to be dependent or contingent in whole or in part upon the successful prosecution or settlement thereof, shall, within thirty days from the date of any such retainer or agreement of compensation, sign and file in the office of the clerk of the Appellate Division, Second Judicial Department, a written statement setting forth the date of any such retainer or agreement of compensation, the terms of compensation, the name and home address of the client and the name and office address of the attorney, and the date and place of the occurrence of the injury or damage or the title and description of the condemnation or change of grade proceeding, the date it was commenced and the number or other designation of the parcels affected.

"If the action or claim arises from personal injuries or property damage, it shall also be stated whether or not the client was personally known to the attorney prior to the date of injury or property damage, the name and address of any person or persons who referred the client to the attorney or who had any connection with referring the client

preservation for a five-year period of "the pleadings, records and other papers pertaining to such action . . ., and also all data and memoranda of the disposition thereof . . . . [Rule 5]"

Petitioner has been an attorney in Kings County since his admission to the bar in 1926, practicing primarily in actions covered by the terms of the special rules. Pursuant to those rules, during the years 1953 to 1959, petitioner filed over 1000 statements of retainer (R. 12). On June 2, 1958, a subpoena issued calling for petitioner to appear before the Judicial Inquiry and to produce records generally described as pertaining to his business as an attorney but specifically including such items as his check book stubs, cancelled checks, savings account pass books, records of all loans from financial institutions and others, and state and federal tax returns (R. 1-2).[3] Petitioner's motion to quash

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to the attorney, stating the connection. This shall be stated if the attorney was retained or associated in any way in five or more claims made or actions instituted in the previous calendar year for personal injuries, property damage or both.

"Such statements may be filed personally by the attorney or his representative, or by registered mail. Such statements may also be filed by ordinary mail, provided the statements are accompanied by a self-addressed stamped return postal card containing the date of the retainer and the name of the client. The postal card will be signed by the clerk of the court and mailed to the attorney; and it will serve as a receipt for the filing of the statement of retainer.

"No attorney shall accept or act under any written retainer or agreement of compensation in which the name of the attorney is left in blank at the time of its execution."

[3] The record does not reflect the Judicial Inquiry's reason for including petitioner as a witness before it. The Presiding Justice stated that there were no charges against him (R. 41), and counsel for the Inquiry stated that the Inquiry's examinations of records on various occasions resulted in no finding of wrongdoing, but "if we do find anything that is improper or anything that proves a point, then and only then do we offer [records] in evidence [R. 37]."

In light of the interest of respondent in the number of statements of retainer filed by petitioner (R. 12; Brief in Opposition to Petition for Certiorari, pp. 2-3), and in the absence of any other reason appearing in

the subpoena was denied, *Anonymous* v. *Arkwright*, 7 App. Div. 2d 874, 181 N.Y.S. 2d 784, *leave to appeal denied*, 5 N.Y. 2d 710, *cert. denied*, 359 U.S. 1009, and he appeared before the Judicial Inquiry and was sworn as a witness (R. 26). The Presiding Justice had refused permission for observers to be present, since the Inquiry was a "secret investigation," but he did grant the request of petitioner's counsel that he be permitted to remain during petitioner's questioning (R. 22, 25).

Though petitioner was sworn as a witness, he advised the Presiding Justice that, in view of possible tax or other problems and in view of the Court's inability to grant him immunity, he refused to produce his records or to answer questions under a claim of the privilege against self-incrimination (R. 29-32). The Presiding Justice stated his "opinion" that petitioner had "a perfect right to plead that constitutional privilege" but called attention to the fact that a "test case" was being prepared by the Inquiry on the theory that "such a plea, made in the context of this Inquiry, might be indicative of such a lack of candor . . . as to warrant disciplinary proceedings based upon that ground alone [R. 30]." Therefore, the Presiding Justice determined that no further proceedings would be held in petitioner's case until the final disposition of that test case (R. 33-34).

The test case, *Cohen* v. *Hurley*, 366 U.S. 117, was decided by this Court in April, 1961. In July of that year petitioner wrote the Presiding Justice of the Inquiry that, in view of the decision in *Cohen*, he wished to withdraw his claim of privilege (R. 52). Shortly thereafter he retained new counsel, and, after further adjournments of the hearing, he appeared before the Inquiry, was recalled to the witness

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the record, it is a fair inference that petitioner was called before the Inquiry principally as a result of his extensive practice, as was the case in *Cohen* v. *Hurley*, 366 U.S. 117, 119-20.

stand and was asked if he did wish to withdraw his claim of privilege, as indicated in his letter. Petitioner replied that, upon the advice of his new counsel, he continued to claim his privilege against self-incrimination under the Fifth and Fourteenth Amendments, and also under Article 1, Section 6 of the State Constitution. He also stated his reliance upon the standard of fundamental fairness of the due process clause of the Fourteenth Amendment and upon the equal protection clause of that Amendment. (R. 42-43).[4]

In response to questions by the attorney for the Inquiry as to the specific documents included in the subpoena, petitioner persisted in his decision "not to produce any of the records or to answer any questions in relation thereto [R. 43]." Counsel for the Inquiry previously had stated that he wished to proceed, "as we do in all cases, to have [petitioner] come in, take the stand and produce [the records], and we can then mark them for identification. Then he can explain the absence of any other records. We can go through the subpoena piecemeal with him [R. 36]." Petitioner's counsel advised counsel for the Inquiry, however, that he did not wish to place petitioner "in the position that it may ever be urged that he opened the door by answering these questions" and that, unless he could be assured that no such position would be taken by the Inquiry, he would advise petitioner to answer no further questions (R. 47). No such assurance was given and the questioning was discontinued.

At no time during the hearings before the Judicial Inquiry did either the Presiding Justice or counsel for the Inquiry contend that the privilege against self-incrimination was not applicable to petitioner's refusal, in the cir-

[4] At the close of the hearing before the Judicial Inquiry petitioner reiterated his claims under the Fifth and Fourteenth Amendments and stated his reliance, in addition, upon the Fourth Amendment (R. 51).

cumstances of his claim, to answer questions or to produce records. Counsel for the Inquiry did contend at the hearing that petitioner's decision to continue to rely upon the privilege after having indicated that he would withdraw that privilege was a "lack of cooperation," but he did not contend that petitioner had made any irrevocable waiver of the privilege (R. 46). Counsel continued that the Inquiry would initiate disciplinary proceedings against petitioner, and that its position would be that petitioner's claim of privilege was a lack of cooperation in the same sense as that of the attorney in the *Cohen* case, justifying the same result—disbarment (R. 48).

After the close of the hearing, a petition for disciplinary proceedings against petitioner was filed by respondent, Solomon A. Klein,[5] by direction of the Judicial Inquiry. The petition (R. 4-10) alleged that this petitioner had been guilty of misconduct in ten separate respects. Eight of the charges were allegations that he had failed to comply with certain court rules relating to filing of retainer statements, that he had filed false pleadings, that he had commingled clients' funds with his own and that he had violated the canons of ethics. The ninth charge was that apart from his refusal to answer questions or to produce records, he had obstructed the Inquiry by obtaining repeated postponements and making or causing to be made false representations; and the tenth charge was that he was guilty of misconduct in that "his refusal to answer questions and to produce the records required by said subpoena duces tecum to be produced, are in disregard and in violation of the inherent duty and obligation of [petitioner] as a member of the legal profession . . . [R. 7]." The petition

[5] The order of the Appellate Division directing respondent to institute disciplinary proceedings against petitioner refers to respondent only as "an attorney" (R. 3-4), but respondent is Chief Counsel to the Judicial Inquiry.

and answer (see R. 57-58) were referred to a referee for hearing, at which hearing respondent announced that he was abandoning all charges in the petition other than the ninth and tenth charges (R. 13, 59). Petitioner was again called to testify, and he again refused to answer questions under a specific claim of all the federal constitutional provisions upon which he had relied in the Judicial Inquiry (R. 53-54).[6]

In his report, the referee found that respondent had not proven the allegations in the ninth charge. Among his findings were that there was no claim or evidence that petitioner's claim of privilege "was invoked more extensively than reasonably required to protect [him] against incrimination" (R. 67) and that the Inquiry was neither misled nor prejudiced by petitioner's July 1961 letter indicating his intention to withdraw his claim of privilege (R. 74-76). As to the tenth charge, the referee found that petitioner did refuse to answer questions and to produce records under claims of constitutional privileges, federal and state, but he made no finding as to whether the refusals were in violation of petitioner's duties as an attorney, since that question was "inextricably bound up with the constitutional issues raised by [his] affirmative defense, and resolution of those issues is not within my province [R. 79-80]."

Respondent moved in the Appellate Division for confirmation of the referee's report and for imposition of discipline against petitioner, and the Appellate Division entered an order disbarring petitioner (R. 81-83).[7] Finding

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[6] While petitioner refused to answer questions in the hearing before the referee, the referee did not consider petitioner's conduct in that hearing as bearing upon respondent's charges of misconduct. Rather, he explicitly restricted his consideration to petitioner's conduct before the Judicial Inquiry (R. 61).

[7] In his brief in the Appellate Division in support of his motion to confirm the referee's findings, respondent for the first time suggested that petitioner did not have a constitutional right to refuse to produce his

the sole issue to be the charge that petitioner "had refused to produce his financial records and had refused to testify before the justice presiding at said Judicial Inquiry [R. 84]," the court, relying solely upon the *Cohen* case, held that an attorney has "an absolute right to invoke his constitutional privilege against self-incrimination" but that when he does so "he fails in his inherent duty to the court to divulge all pertinent information necessary to show his character and fitness to remain a member of the Bar and necessary to the proper administration of justice, and he must, consequently, forfeit his privilege of remaining a member of the bar [R. 84-85]." The Court in no sense questioned either the applicability of the Fifth Amendment to petitioner's refusal to testify and to produce records or his good faith in asserting the privilege, but it held squarely that, if he elected to invoke the privilege, he could not continue to practice law (R. 85).

The Court of Appeals affirmed the judgment of the Appellate Division in a memorandum order without opinion, on the authority of *Cohen* "and on the further ground that the Fifth Amendment privilege does not apply to a demand" for the production of records "required by law to be kept" by an attorney (R. 86). Judge Fuld concurred, stating that, while he adhered to his views in dissent in *Cohen*, see 7 N.Y. 2d 488, 498-502, 166 N.E. 2d 672, 677-80, he deemed himself bound by that case.

Upon motion by petitioner, the court subsequently amended its remittitur, stating that petitioner's claims of violation of his federal privilege against self-incrimination

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records. Neither in the Judicial Inquiry nor in the hearing or briefs before the referee did respondent assert that the required records doctrine removed petitioner's privilege. (While they are not a part of the printed record, the parties' briefs before the referee and in the Appellate Division are included in the record certified to this Court.)

and of his right to due process of law were necessarily passed upon (R. 90-91).

Summary of Argument

1. The principal reliance of the Court of Appeals and the sole reliance of the Appellate Division in support of their judgments was the decision in *Cohen* v. *Hurley*, 366 U.S. 117, *affirming* 7 N.Y. 2d 488, 166 N.E. 2d 672, which held that disbarment of an attorney who refused, under a claim of the State privilege against self-incrimination, to testify and to produce records before the Judicial Inquiry, did not violate the standard of fundamental fairness of the Fourteenth Amendment. We contend that reliance upon *Cohen* was misplaced, since the Court's decision in *Malloy* v. *Hogan*, 378 U.S. 1, expressly repudiated the rationale of *Cohen* and made clear that state action is limited by the same standard of the self-incrimination clause of the Fifth Amendment which restricts federal action. That standard precludes the imposition of a penalty which makes more costly the exercise of the privilege against self-incrimination, *Griffin* v. *California*, 380 U.S. 609, and disqualification from the practice of one's profession is just such a proscribed penalty. And if disbarment in these circumstances is not a *penalty* within the meaning of the Fifth Amendment, it is clearly a method of compulsion employed by the State to extract incriminating evidence, and any such compulsion is prohibited by the Fifth Amendment. *Bram* v. *United States*, 168 U.S. 532.

2. Even if the threat of disbarment is not the kind of compulsion that the federal and state governments may not employ by virtue of the specific prohibition of the Fifth Amendment's self-incrimination clause, this Court's decision in *Malloy* establishes that the requirements of fundamental fairness imposed by the due process clause of the

Fourteenth Amendment may no longer be determined without reference to the duty of a state to preserve the guaranties of the Fifth Amendment. Thus, *Cohen* and other of this Court's decisions must be re-examined in light of the individual's right, now protected against state action, to be free from compulsory self-incrimination. That vital interest, weighed against the absence of any showing by the State that its legitimate interest in maintaining the standards of the bar cannot be protected by shouldering its burden of independent investigation and proof of wrongdoing, compels the conclusion that the State's imposition upon attorneys of an election between relinquishment of the privilege against self-incrimination and disbarment is arbitrary and capricious. See *Slochower* v. *Board of Education*, 350 U.S. 551; *Wieman* v. *Updegraff*, 344 U.S. 183. Similarly, the State's recognition of the availability of the privilege to petitioner as a citizen but its unavailability to him as an attorney evidences a classification which is not only arbitrary within the meaning of the due process clause of the Fourteenth Amendment but also fatally discriminatory within the meaning of that Amendment's equal protection clause.

3. No different conclusion results from the fact that the State required attorneys to keep records pertaining to the disposition of actions in which they represented clients under contingent fee arrangements. Even if the "required records" doctrine established in *Shapiro* v. *United States*, 335 U.S. 1, were a valid limitation upon the scope of the privilege against self-incrimination and were applicable to the record requirement involved in this case, petitioner's disbarment, based only in part on that doctrine and in part on the invalid rationale of *Cohen*, could not stand. See *Thomas* v. *Collins*, 323 U.S. 516, 519. But in any event the *Shapiro* doctrine that the government, state or federal, may

remove the applicability of the privilege to the papers of an individual merely by enacting a requirement that such papers be kept is wholly invalid, as an unwarranted limitation upon the scope of the privilege as earlier determined in *Boyd* v. *United States*, 116 U.S. 616, as inconsistent with the recent decision in *Albertson* v. *SACB*, 382 U.S. 70, and as violative of this Court's repeated injunctions that the privilege be accorded a liberal construction. See *e.g.*, *Miranda* v. *Arizona*, 384 U.S. 436, 461.

Even assuming that the scope of the privilege can be limited to an extent through state-imposed record-keeping requirements, the policy of the privilege requires at least that such limitations be no more extensive than clearly required in order to protect a valid state interest which cannot adequately be protected through any means other than a limitation upon the scope of the privilege. No such showing has been made in this case and, therefore, the required records doctrine is inapplicable. Further even if some limitation of the scope of the privilege were necessary to effect the State's interest here, the State has removed the privilege from a class of documents much broader than that involved in *Shapiro*, so that that case does not support the State's unduly broad intrusion into the privacy guaranteed by the Fifth Amendment privilege.

Finally, whatever may be the validity and scope of the required records doctrine, its application to this case, where the availability of the privilege was recognized by the Judicial Inquiry and the Appellate Division and was only belatedly questioned by respondent, is inconsistent with *Raley* v. *Ohio*, 360 U.S. 423.

ARGUMENT

I. The Disbarment of Petitioner Was a Violation of the Specific Guaranties of the Fifth Amendment.

A. *The Reliance of the Courts Below Upon Cohen* v. *Hurley was Misplaced.*

The opinion of the Appellate Division relied solely upon the decision in *Cohen* v. *Hurley*, and the Court of Appeals also relied upon that case. In *Cohen*, this Court upheld the disbarment of an attorney for his refusal to testify and to produce records before the same Judicial Inquiry involved in this case, holding that it was neither arbitrary nor discriminatory for the State to disbar an attorney who, by claiming his *State constitutional privilege* against self-incrimination, failed adequately to "cooperate" with the Inquiry. The Court passed only upon the contention that it was fundamentally unfair, and hence in violation of the Fourteenth Amendment, to force an attorney to elect between relinquishment of the privilege and disbarment. In rejecting that contention the Court relied upon the premise that "a State has great leeway in defining the reach of its own privilege against self-incrimination . . ." 366 U.S., at 125. The Court also held that the attorney had not preserved any Fifth Amendment claim and that, in any event, no Fifth Amendment privilege was applicable in a State proceeding. Thus, under the analysis of the majority in *Cohen*, "if any 'constitutional privilege against self-incrimination' has here been made a '"phrase without reality"' it can only have been a state privilege which this Court does not have jurisdiction to protect." *Id.*, at 128, n. 8. But see *id.*, at 131-166 (dissenting opinions of Black, Douglas and Brennan, J.J.).

We contend that the Court's due process analysis in *Cohen* should be re-examined and rejected, see pp. 29-39,

infra, but, in any event, that analysis is inapplicable to petitioner's claim under the Fifth Amendment. The *Cohen* premise that the Fifth Amendment prohibition against compulsory self-incrimination does not limit state action was rejected in *Malloy* v. *Hogan*, 378 U.S. 1, which held that "the Fourteenth Amendment secures against state invasion *the same privilege* that the Fifth Amendment guarantees against federal infringement. . . ." *Id.*, at 8. (Emphasis added.) *Malloy* explicitly rejected the suggestion that "the availability of the federal privilege to a witness in a state inquiry is to be determined according to a less stringent standard than is applicable in a federal proceeding," holding that "[i]f *Cohen* v. *Hurley* . . . and *Adamson* v. *California* . . . suggest such an application of the privilege against self-incrimination, that suggestion cannot survive recognition of the degree to which the *Twining* view of the privilege has been eroded." *Id.*, at 10-11. Thus the Court is faced here not with a claim limited to a State privilege but with petitioner's claim, timely presented and preserved at all stages of this case, that the State's action in disbarring him for his refusal to relinquish his Fifth Amendment privilege is in violation of the guaranties of *that privilege*, as secured against state action by the Fourteenth Amendment.

B. *The Standard of the Fifth Amendment Prohibits Imposing the Penalty of Disbarment as a Consequence of Invoking the Privilege Against Self-Incrimination.*

As a preliminary matter, we note that, throughout the proceedings in this case, the parties and the courts have focused not upon the question of whether the privilege was available to petitioner but rather upon the question of the sanction—*i.e.*, disbarment—which might or might not constitutionally be imposed in consequence of petitioner's refusal to relinquish a valid claim of the privilege.

The Court of Appeals placed partial reliance upon the inapplicability of the privilege to so-called required records, an aspect of this case that we discuss at pp. 42-58, *infra*, but its primary reliance was upon *Cohen*, which upheld disbarment based upon a concededly valid claim of the State privilege. The Appellate Division, the referee, and the Presiding Justice all accepted that petitioner's claim of federal privilege was valid and in good faith both as to his refusal to testify and his refusal to produce records, and no challenge was made in the Judicial Inquiry to the method by which or the circumstances in which petitioner invoked the privilege. In his Brief in Opposition to the Petition for Certiorari, however, respondent contended for the first time that petitioner's refusal to answer questions was a defective "blanket refusal." Brief in Opposition, pp. 10-11. That challenge, even if it were valid, should have been made at the time that petitioner invoked the privilege before the Judicial Inquiry, and may not be relied upon at this late stage. See *Stevens v. Marks*, 383 U.S. 234; *Raley* v. *Ohio*, 360 U.S. 423; *Quinn* v. *United States*, 349 U.S. 155.

Thus, the question appropriately before the Court is whether the State could disbar petitioner for his refusal to relinquish a valid claim of the privilege against self-incrimination. The federal standard, which the courts below failed to apply, is clear from *Malloy*—the State may not infringe "the right of a person to remain silent unless he chooses to speak in the unfettered exercise of his own will, *and to suffer no penalty* . . . for such silence." 378 U.S., at 8. (Emphasis added.) More recently the Court reaffirmed that standard in *Griffin* v. *California*, 380 U.S. 609, 614, holding that comment by a prosecutor upon the refusal to testify is repugnant to the Fifth Amendment, since "[i]t is a penalty imposed by courts for exercising a constitutional privilege. It cuts down on the privilege by

making its assertion costly."[8] That broad protection of the privilege has been recognized at least since *Boyd* v. *United States*, 116 U.S. 616, 634-5, and has been reaffirmed repeatedly by this Court. See, *e.g.*, *Miranda* v. *Arizona*, 384 U.S. 436, 461; *Hoffman* v. *United States*, 341 U.S. 479; *Counselman* v. *Hitchcock*, 142 U.S. 547.

The bar against governmental action imposed by the Fifth Amendment has consisted of two facets: it has prevented the use of compulsion to elicit incriminating statements or documents in any proceeding, civil or criminal, and in any forum, judicial, investigative or administrative, see *e.g.*, *Boyd* v. *United States*, *supra*; *Counselman* v. *Hitchcock*, *supra*; *McCarthy* v. *Arndstein*, 262 U.S. 355, 266 U.S. 34; *Smith* v. *United States*, 337 U.S. 137; *Quinn* v. *United States*, 349 U.S. 155; and it has also prevented the use as evidence in a criminal proceeding of statements by or documents of the accused obtained through compulsion or stealth, see *e.g.*, *Gouled* v. *United States*, 255 U.S. 298; *Wan* v. *United States*, 266 U.S. 1; *cf. Haynes* v. *Washington*, 373 U.S. 503. Only to a limited extent, however, have the opinions of this Court focused upon the type of compulsion, if any, that may be employed to "persuade" a person to relinquish his privilege.

It should be emphasized that the question presented here is not whether petitioner had a privilege to refuse to disclose information which could not lead to "incrimination" but which could lead to disbarment, *cf. Ullmann* v. *United States*, 350 U.S. 422, but rather whether the State could use the threat of disbarment to compel petitioner to dis-

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[8] We note incidentally that this case presents no question of retroactivity. Compare *Tehan* v. *Shott*, 382 U.S. 406. Respondent moved in the Appellate Division for confirmation of the referee's report and imposition of discipline against petitioner on April 29, 1965 (R. 82), almost one year after the decision in *Malloy* and the day after the decision in *Griffin*. Both the referee's report (R. 75) and the decision of the Appellate Division (R. 85) noted petitioner's reliance upon *Malloy*.

close information which might tend to incriminate him, and, failing in its purpose, use the sanction of disbarment as a penalty for petitioner's refusal to relinquish the privilege. We do contend that, under this Court's decisions, disbarment is a penalty indistinguishable from the penalty imposed upon conviction of crime, so that the State could not compel petitioner to disclose information which might lead to disbarment, and *a fortiori* it cannot disbar him for refusal to disclose the information, since its action would amount to adjudication of criminal guilt from invocation of the privilege. But if disbarment is not incrimination, so that one may not refuse to disclose information which might lead only to disbarment, it does not follow that the State may impose it as a sanction for refusal to disclose information which *is* protected by the privilege. The question then is whether imposition or threat of disbarment is *compulsion* which may not be used by the State as a means for inhibiting exercise of the privilege.

The *Malloy* and *Griffin* cases, as pointed out above, indicate that the Fifth Amendment should be construed liberally and that no form of governmental coercion, direct or indirect, that serves to impair the exercise of the privilege may stand against the bar of the Fifth Amendment. Statements in this Court's opinions may be found, however, suggesting that only certain types of compulsion are forbidden. In *United States* v. *White*, 322 U.S. 694, 698, for example, it was said that the privilege was "designed to prevent the use of legal process to force from the lips of the accused individual the evidence necessary to convict him . . ."[9] Moreover, the immunity cases, from *Brown* v.

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[9] Mr. Justice Stewart, dissenting in *Griffin* v. *California*, 380 U.S. 609, 620, stated that historically the privilege came into being because a person could decline to answer an incriminating question only "on pain of incarceration, banishment, or mutilation." But compare the very different view taken in *Bram* v. *United States*, 168 U.S. 532, 547-48 quoted *infra*, pp 24-

Walker, 161 U.S. 591, to *Ullmann* v. *United States*, *supra*, may be read as forbidding the Government only from imposing something akin to criminal punishment—*e.g.*, fine or imprisonment for contempt—as a means for compelling testimony or the production of records, although that conclusion by no means necessarily follows from those cases. While they held that a witness may be required to testify if he is accorded immunity from criminal prosecution that is as extensive as the protection of the privilege that is being replaced, they did not hold and it has never been held that the Government is free to *deny* immunity and also to impose a variety of non-criminal or quasi-criminal disabilities upon a person who exercises the privilege.

Even if the Fifth Amendment were to be given a narrow, restrictive reading, and held to forbid the imposition only of sanctions penal in nature upon a person who asserts the privilege, the decisions of this Court establish that forfeiture of an attorney's right to earn a livelihood in his profession must be regarded as such a prohibited sanction. While most of these decisions involve the prohibitions of Article I, Sections 9 and 10, against bills of attainder, the sanction prohibited by those provisions is the legislative infliction of *punishment* without a judicial trial. *United States* v. *Lovett*, 328 U.S. 303, 315. If the Fifth Amendment is to be interpreted to forbid only punishment criminal in nature as the means of extracting incriminating evidence there is no apparent reason why the definition of punishment under the Fifth Amendment

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25. Whatever may have been the forms of compulsion against which the privilege originally was directed, however, this Court has shown that the constitutional protection of the individual's free will is perfectly capable of expanding to meet advancements in governmental techniques which replace raw force with subtle psychological pressures as the means of compulsion. Compare, *e.g.*, the coercive techniques in *Brown* v. *Mississippi*, 297 U.S. 278; *Chambers* v. *Florida*, 309 U.S. 227; *Haynes* v. *Washington*, 373 U.S. 503; and *Miranda* v. *Arizona*, 384 U.S. 436.

should not be at least as broad as the definition of punishment for purposes of Article I, Sections 9 and 10.

In *Ex Parte Garland*, 4 Wall. 333, 377, this Court held invalid as a bill of attainder a statute which denied an attorney the right to practice, stating that "exclusion from any of the professions or any of the ordinary avocations of life for past conduct can be regarded in no other light than as punishment for such conduct."[10] In *Cummings* v. *Missouri*, 4 Wall. 277, provisions of the Missouri Constitution were held invalid as a bill of attainder and *ex post facto* law because "they produce the same result [as criminal statutes] . . . by depriving such persons of the right to hold certain offices and trusts, and to pursue their ordinary and regular avocations. This deprivation is punishment. . . ." *Id.*, at 327.

The earlier bill of attainder cases involved legislative declarations of criminal guilt accompanied by provision for punishment, see *United States v. Lovett*, 328 U.S. 303, 321-322 (concurring opinion of Frankfurter, J.), but the Court in the *Lovett* case held that the formality of such a pronouncement of criminal guilt was not an essential element of unconstitutionality. There the Court held unconstitutional a federal statute which prohibited the further compensation of named government employees. Holding that the "permanent proscription from any opportunity to serve the Government is punishment, and

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[10] In *Ex Parte Wall*, 107 U.S. 265, the Court upheld the disbarment of an attorney from a federal court upon proof of his participation in a lynching, holding that the proceeding was not in violation of the due process clause of the Fifth Amendment. The Court there recognized, however, that "an attorney's calling or profession is his property, within the meaning of the Constitution," *id.*, at 289, and Mr. Justice Field in dissent stated that, "to disbar an attorney is to inflict upon him punishment of the severest character." *Id.*, at 318.

In holding that the proceedings deprived the attorney of no substantial rights, the Court noted that he "was not required to criminate himself by answering under oath." *Id.*, at 271.

of a most severe type," *id.*, at 316, the Court continued that "[t]he fact that the punishment is inflicted through the instrumentality of an Act specifically cutting off the pay of certain named individuals found guilty of disloyalty, makes it no less galling or effective than if it had been done by an Act which designated the conduct as criminal." *Ibid.* Under the same reasoning, the disbarment of petitioner in this case is no less effective a punishment than if the courts below had held him in contempt for refusing to relinquish the privilege, which they clearly could not do, see *Quinn* v. *United States*, 349 U.S. 155, and then disbarred him as punishment for that contempt.[11]

It is, of course, not controlling whether the State labels either the sanction or the proceeding in which it is imposed "criminal" or "civil." In *Boyd* v. *United States*, 116 U.S. 616, the Court held unconstitutional a federal statute providing for compulsory production of documents which by its terms applied to "suits and proceedings other than criminal," 18 Stat. 187, quoted at p. 51, n. 22, *infra*, and the proceeding in *Boyd* was a civil forfeiture action against property, to which Boyd was a party only because he entered a claim for the property. The statute struck down in *Boyd* offered an election between production of the document and forfeiture of the 35 cases of plate glass at issue in the proceeding. The Court held that "[a] witness, as well as a party, is protected by the law from being compelled to give evidence that tends to

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[11] Disbarment as punishment for contempt has been applied in the state courts. See 17 C. J. S. Contempt, § 92; *In re Dunn*, 85 Neb. 696, 124 N.W. 120; *In re Hanson*, 134 Kan. 145, 5 P. 2d 1088. As for federal courts, in *Ex Parte Robinson*, 19 Wall. 505, this Court issued a mandamus ordering vacation of an order disbarring an attorney as punishment for contempt, holding that the specific kinds of punishment for contempt enumerated in the Judiciary Act of 1789 negated all other types of punishment, including disbarment. But *cf. Gelders* v. *Haygood*, 182 Fed. 109 (Cct. Ct. S.D. Ga.).

criminate him, or to subject his property to forfeiture." *Id.*, at 638. Thus the Court found the sanction to be within the "spirit" though not the "literal terms" of both the Fourth and Fifth Amendments, *id.*, at 633, since "proceedings instituted for the purpose of declaring forfeiture of a man's property by reason of offenses committed by him, though they may be civil in form, are in their nature criminal." *Id.*, at 634. Compare *Plymouth Sedan* v. *Pennsylvania*, 380 U.S. 693, 701, where the Court applied the Fourth Amendment's exclusionary rule to a proceeding for forfeiture of an automobile, noting that the forfeiture of a $1,000 automobile was an "even greater punishment" than the maximum penalty of a $500 fine that could have been imposed upon the owner in a criminal proceeding.

Finally, the punitive character of petitioner's disbarment would not be altered by any argument of the State that its purpose was not vindictive but only preventive—*i.e.*, to safeguard the bar and the public from whatever harm might be caused in the future by an attorney so lacking in candor and frankness that he claimed the privilege against self-incrimination. The Court only recently rejected just such an argument in *United States* v. *Brown*, 381 U.S. 437. In holding unconstitutional as a bill of attainder a federal statute which disqualified members of the Communist Party from holding union offices, the court in *Brown* said that "[i]t would be archaic to limit the definition of 'punishment' to 'retribution.' Punishment serves several purposes: retributive, rehabilitative, deterrent—and preventive. One of the reasons society imprisons those convicted of crimes is to keep them from inflicting future harm, but that does not make imprisonment any the less punishment." *Id.*, at 458.

Disbarment, then, clearly can be regarded as punishment criminal in nature, just as can other sanctions apart from fine or imprisonment. In *Speiser* v. *Randall*, 357

U.S. 513, 518, for example, the Court held that "[t]o deny an exemption [from property taxes] to claimants who engage in certain forms of speech is in effect to penalize them for such speech. Its deterrent effect is the same as if the State were to fine them for this speech." See, also *Kennedy* v. *Mendoza-Martinez*, 372 U.S. 144, 163-184; *Steinberg* v. *United States*, 143 Ct. Cl. 1, 163 F. Supp. 590; see generally, Ratner, *Consequences of Exercising the Privilege Against Self-Incrimination*, 24 U. Chi. L. Rev. 472 (1957). Since the State could not constitutionally require petitioner to disclose information which could result in the imposition of the penalty of disbarment, it could not constitutionally impose that penalty upon him solely because he refused to relinquish his privilege.

That a broad meaning must be given to the term, "criminal," as it is used in the Fifth Amendment was established in the opinion of Mr. Justice Bradley for the Court in *Boyd*. That opinion should be considered in light of his earlier opinion as Circuit Justice in *Rich* v. *Campbell*, reported *sub nom. United States* v. *Collins*, 25 Fed. Cas. 545, 549-550 (Cct. Ct., S.D. Ga.), in which a United States Marshal was called as a witness in connection with a party's challenge that jurors were improperly selected by the court's officers, of whom the Marshal was one. The court

> "refused to compel him to testify, for the following reasons: Where a charge of misconduct is made against an officer, *whether amounting to an indictable offense, or only to his discredit as such officer, which might furnish grounds for his removal or impeachment*, he is not bound to be a witness against himself. To compel him to be so would infringe the spirit, if not the letter, of the fifth amendment to the constitution of the United States, which expressly declares that no person shall be compelled, in any criminal

case, to be a witness against himself. An inquisitorial examination, under oath, of a party charged with an offense, is repugnant to the principles of personal liberty, which are embodied in every fibre of the common law. . . . If the party stands upon his rights, it raises an implication, however unjustifiable, that there is some good reason (unfavorable to him) for his refusal to be examined. *Such an implication ought in no case to exist.* The immunity is founded on principles of public policy and a regard to the just liberties of every citizen; and, when claimed, ought to be regarded and claimed as a fundamental right which cannot be properly assailed." (*Emphasis added.*)

That is the view of the fundamental character of the privilege against self-incrimination which found its way into *Boyd*, and that is the view of the privilege which we contend should apply in according the privilege "liberal construction in favor of the right it was intended to secure." *Hoffman* v. *United States*, 341 U.S. 479, 486.

It is, however, unnecessary to reach the question of whether disbarment is equivalent to incrimination within the meaning of the Fifth Amendment. This Court's decisions demonstrate that the threat of fine or imprisonment or its equivalent is not the only form of compulsion which the government may not employ to elicit information protected by the privilege. Only last term, in *Miranda* v. *Arizona*, 348 U.S. 436, this Court reaffirmed the teaching of *Bram* v. *United States*, 168 U.S. 532, that it is the extraction of incriminating evidence by the exercise of *any* improper influence that is forbidden by the Fifth Amendment. The *Bram* opinion explained that since the common law principle holding "that one accused could not be compelled to testify against himself, was in its essence comprehensive enough to exclude all manifestations of

compulsion, whether arising from torture or moral causes, the rule formulating the principle with logical accuracy, came to be so stated as to embrace all cases of compulsion which were covered by the doctrine." And it was this doctrine which, while "in England was a mere rule of evidence, became clothed in this country with the impregnability of a constitutional enactment." *Id.*, at 547-48, 545.

While *Bram* and *Miranda* involve the second facet of the Fifth Amendment's prohibitions, in that the sanction there imposed was the suppression of evidence obtained by unlawful compulsion, those cases held that the means employed to obtain such evidence were in violation of the Fifth Amendment. Since persistent questioning of an accused, in the absence of counsel and without adequate warning of his right to remain silent, can hardly be characterized as criminal punishment, it is evident that at least some forms of compulsion other than criminal punishment are denied the government. Similarly, comment by a prosecutor in a criminal proceeding upon the the refusal of an accused to testify is not in itself criminal punishment but it is nonetheless prohibited by the Fifth Amendment. *Griffin* v. *California*, 380 U.S. 609.

If the Court should accept our contention that the forms of compulsion forbidden by the Fifth Amendment are not limited to penal sanctions but should draw the line somewhere between the prohibition of any compulsion and the prohibition of only the most severe kinds of compulsion, there can be little question as to the side of that line on which this case would fall. The badge of infamy that a decree of disbarment inflicts upon an attorney is as drastic a penalty as imprisonment. Indeed, the disgrace imposed upon an attorney and his family, coupled with the deprivation of his livelihood, make almost insignificant the forfeiture of 35 cases of plate glass held to be an unlawful penalty in *Boyd*. Thus, even if it should some day be held

that a person may be required to elect between relinquishment of the privilege and some comparatively mild form of governmental compulsion, the governmental imposition of a choice between disbarment and relinquishment of the privilege cannot be countenanced.

C. *Petitioner's Disbarment was Imposed as a Consequence of Invoking the Privilege.*

The Appellate Division, apparently in an attempt to avoid the decision in *Slochower* v. *Board of Education*, 350 U.S. 551, that a statute which "operates to discharge every city employee who invokes the Fifth Amendment" is unconstitutional, 350 U.S., at 558, reiterated the language from its opinion in *Cohen* that the basis for disbarment was not petitioner's invocation of the privilege but rather his deliberate refusal "'to cooperate with the court . . . [R. 85].'" The opinion continued, however, as follows:

> "Under the circumstances, this court has no alternative other than to disbar the [petitioner]. If he elects to invoke his constitutional privilege against self-incrimination and thus avoid exposure to criminal prosecution—an election which undoubtedly is his to make—he cannot at the same time retain his privilege of membership at the bar. To that doctrine this court must adhere [R. 85]."

Thus, the court destroyed its own attempt to rationalize that its action was not a penalty imposed as a consequence of exercising the privilege by stating clearly that it was precisely such a penalty. The doctrine to which it "must adhere" is inflexibly to put attorneys to "'a choice between the rock and the whirlpool,'" *Stevens* v. *Marks*, 383 U.S. 234, 243, disbarring all who invoke the privilege when called upon to testify and produce their records. Here, as in *Slochower*, "the assertion of the privilege against

self-incrimination is equivalent to a resignation" and "[t]he heavy hand . . . falls alike on all who exercise their constitutional privilege, the full enjoyment of which every person is entitled to receive." 350 U.S., at 554, 558.

Both the opinion of the Appellate Division and the referee's report establish that the charge of petitioner's purported failure to cooperate with the Judicial Inquiry was sustained only as to his refusal to testify and to produce records, and they also establish that the refusal was based upon a good faith claim of his privilege against self-incrimination. Indeed, the referee soundly refrained from making a finding as to whether petitioner's refusal was a violation of his duties as an attorney on the ground that the question was "inextricably bound up with the constitutional issues raised" by him (R.80). The State cannot extricate the inextricable by ignoring the only basis for petitioner's refusal to furnish information, looking only at the refusal, itself, and labeling it a violation of a duty to cooperate or to be candid and frank.[12] Whatever it may call its action, the "legal result must be the same, for what cannot be done directly cannot be done indirectly. The Constitution deals with substance, not shadows. Its inhibition was leveled at the thing, not the name." *Cummings* v. *Missouri*, 4 Wall. 277, 325.

Unquestionably, petitioner has a duty as an attorney to be candid and to cooperate with the Court, but he also has a constitutional right to refuse to furnish information

[12] We recognize that this Court has, at times, been willing to accept a State's characterization of its action at face value in cases similar to this one though not presenting the question of the application to the State of the specific guaranties of the Fifth Amendment. We discuss those cases at p. 32, n. 14, *infra*. Nonetheless, there is a "long course of judicial construction which establishes that the duty rests on this Court to decide for itself facts or constructions upon which federal constitutional issues rest." *Kern-Limerick, Inc.* v. *Scurlock*, 347 U.S. 110, 121; see *Napue* v. *Illinois*, 360 U.S. 264, 271-2; *Haynes* v. *Washington*, 373 U.S. 503, 516-518.

which might tend to incriminate him. Indeed, prior to *Cohen* the State had repeatedly recognized that "'[t]he constitutional privilege is a fundamental right and a measure of duty; its exercise cannot be a breach of duty to the court.'" *In re Grae*, 282 N.Y. 428, 435, 26 N.E. 2d 963, 967; see *In re Solovei*, 276 N.Y. 647, 12 N.E. 2d 802. But the State in *Cohen*, 7 N.Y. 2d 488, 166 N.E. 2d 672, *aff'd*, 366 U.S. 117, created a new kind of duty, in a test case prepared by the Judicial Inquiry, in the words of its Presiding Justice, because "[i]t was the thought in some quarters that such an attitude, or such a plea [of the privilege], made in the context of this Inquiry, might be indicative of such a lack of candor . . . as to warrant disciplinary proceedings based upon that ground alone [R.30]." We contend that the purpose of that test case was to provide a basis for restricting the exercise by attorneys of the privilege against self-incrimination, as evidenced by the above statement and by the statement of an earlier Presiding Justice of the Inquiry, quoted in *Anonymous v. Baker*, 360 U.S. 287, 296, n. 11:

> "'We have been scrupulous in apprising all attorneys of the stated purposes of the Inquiry as laid down by the Appellate Division, and witnesses, whenever required, have been advised of their constitutional rights.
>
> "'As many as 30 persons sworn as witnesses before the Additional Special Term have, as is their unquestioned right, invoked their constitutional privilege against self-incrimination, including 11 attorneys and 10 doctors. *Faced with this roadblock, Counsel for the Inquiry has been forced to develop and to present independent evidence of the facts.*'" (Emphasis added.)

The "roadblock" then was the State privilege, but it now includes the Fifth Amendment privilege as well. It is a roadblock aptly characterized as "one of the great landmarks in man's struggle to make himself civilized," Griswold, *The Fifth Amendment Today* 7 (1955), and it cannot be surmounted or skirted by the State or by the federal government through penalizing those, such as petitioner, who choose to invoke it.

II. The Disbarment of Petitioner Was Arbitrary and Discriminatory State Action in Violation of the Due Process and Equal Protection Clauses of the Fourteenth Amendment.

As we have just shown, petitioner's disbarment was a penalty prohibited by the self-incrimination clause of the Fifth Amendment, as applied to the states by the Fourteenth Amendment. We show below that the State's action was also in violation of the more generalized prohibitions of the Fourteenth Amendment's due process and equal protection clauses, which prohibit arbitrary or discriminatory deprivation of either one's right to practice a profession or of public employment. *Konigsberg* v. *State Bar*, 353 *U.S.* 252; *Schware* v. *Board of Law Examiners*, 353 U.S. 232; *Slochower* v. *Board of Education, supra; Wieman* v. *Updegraff*, 344 U.S. 183.

A. *The Standard of Fundamental Fairness in This Area Is Not Controlled by Cases Decided Prior to the Application of the Privilege Against Self-Incrimination As a Limitation Upon State Action.*

To say that we contend, in this portion of our argument, that the State has failed to comply with the standard of fundamental fairness imposed by the Fourteenth Amendment is by no means to say that the full application

to the states of the Fifth Amendment privilege against self-incrimination is not relevant to that standard. Even if disbarment of an attorney is not a penalty absolutely proscribed by the Fifth Amendment, there can be no question about the very substantial deterrent effect of disbarment upon the exercise of a privilege which the states are now required fully to protect. Accordingly the determination of whether the automatic disbarment of a lawyer who invokes the privilege against self-incrimination amounts to a denial of due process cannot be made without according full weight to the privilege and its policies, which include preservation of " 'a fair state-individual balance by requiring the government to leave the individual alone until good cause is shown for disturbing him and by requiring the government in its contest with the individual to shoulder the entire load. . . .' " *Murphy* v. *Waterfront Comm'n*, 378 U.S. 52, 55. In short, if the disbarment is within the specific prohibitions of the Fifth Amendment, the State may not impose that penalty whatever may be the legitimacy or weight of its countervailing interest. *Miranda* v. *Arizona*, 384 U.S. 436, 479; see *Barenblatt* v. *United States*, 360 U.S. 109, 126. But if the compulsory effect of disbarment as an unquestionable deterrent to the exercise of the privilege somehow falls short of the kind or degree of compulsion absolutely prohibited by the standard of the Fifth Amendment, the question becomes whether the State's interest in maintaining the standards of its bar is so compelling and the means used to effect that interest —the adoption of a rule that denies every attorney who refuses to relinquish the privilege the right to earn a living in his chosen profession—are so essential that the constitutional rights of the individual must be relinquished to enable that interest to be achieved.

In considering this question, the decision in *Cohen* v. *Hurley*, 366 U.S. 117, is plainly not controlling. Whatever

may have been the validity of the analysis and the determination reached in the *Cohen* case at the time it was decided, the subsequent recognition by this Court that the privilege against self-incrimination is a fundamental personal liberty that serves to limit state action by reason of the due process clause of the Fourteenth Amendment eliminates any value as a precedent that that case might otherwise have had. A major premise of *Cohen*, in concluding that disbarment there was *not* irrational and arbitrary, was that the State was not limited by the attorney's federal constitutional right not to incriminate himself, so that, "something substantially more must be shown than that the state procedures involved have a tendency to discourage the withholding of self-incriminatory testimony." 366 U.S., at 129.

Admittedly, the decisions cited by the Court for the absence of any protection against self-incrimination in a state proceeding furnished strong support for the conclusion that disbarment for a refusal to relinquish the privilege was not arbitrary. Thus, the Court cited, *id.*, at 128-129, *Twining* v. *New Jersey*, 211 U.S. 78, and *Adamson* v. *California*, 332 U.S. 46, which established that there was no denial of fundamental fairness in requiring a criminal defendant to elect between testifying or suffering the penalty of comment by the prosecutor upon his refusal to do so; and *Knapp* v. *Schweitzer*, 357 U.S. 371, which held that a state grand jury witness could constitutionally be held in contempt for his refusal to subject himself to federal incrimination. If a state may jail a person for refusing to testify on the ground of possible federal incrimination, it is not inconsistent to permit disbarment for a similar refusal. But the major premise of *Cohen* was repudiated by this Court's decision in *Malloy*, and the applications of that premise in *Twining*, *Adamson* and *Knapp* were also repudiated in *Griffin* v. *California*, 380

U.S. 609, and *Murphy v. Waterfront Comm'n*, 378 U.S. 52.[13] In light of the course of constitutional interpretation by this Court since *Cohen*, then, the standards applied in that case are inapplicable to the question of the validity of state procedures which operate to impair the personal liberties guaranteed by the privilege against self-incrimination.[14]

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[13] As pointed out at p. 14, *supra*, this Court in *Cohen* also held that the petitioner had preserved only his State constitutional privilege and not his Fifth Amendment privilege. Thus the question was whether the State's admitted interest in maintaining the standards of the bar was of sufficient importance to permit it, without violating the due process clause of the Fourteenth Amendment, to require relinquishment of the State privilege as a means of accomplishing that objective. The scope of that privilege, in the absence of a federal constitutional requirement that such a privilege must be accorded by the State, was obviously a matter for determination by the State and not by this Court. A very different question is presented here.

[14] The same conclusion follows as to this Court's related decisions in *Nelson* v. *Los Angeles County*, 362 U.S. 1; *Beilan* v. *Board of Education*, 357 U.S. 399; and *Lerner* v. *Casey*, 357 U.S. 468, in which dismissals from public employment of persons who refused to answer questions in varying circumstances were upheld. In *Beilan* the employee did not base his refusal upon any form of privilege against self-incrimination, although subsequent to his refusal to answer questions posed by his State employer and previous to his dismissal for "incompetency," he did refuse to testify before a subcommittee of the House Un-American Activities Committee on Fifth Amendment grounds.

Both *Nelson* and *Lerner* did involve dismissals of employees who had invoked the privilege as a ground for refusal. In *Lerner*, the Court reasoned that the State could dismiss an employee under statutory grounds of "doubtful trust and reliability," 357 U.S., at 470, because of his refusal to answer a relevant question. It then found that,

> "The issue then reduces to the narrow question whether the conclusion which could otherwise be reached from appellant's refusal to answer is constitutionally barred because his refusal was accompanied by the assertion of a Fifth Amendment privilege. We think it does not. *The federal privilege against self-incrimination was not available to appellant through the Fourteenth Amendment in this state investigation.*" Id., at 478. (Emphasis added.)

The Court in *Nelson* regarded that case as controlled by *Beilan* and *Lerner*. See 362 U.S., at 7.

Thus, while we would contend that *Nelson*, *Beilan* and *Lerner* were, even when decided, unwarranted limitations upon the principle of *Slochower* v. *Board of Education*, 350 U.S. 551, in any event they are no longer controlling in light of *Malloy*, *Griffin*, *Murphy*, and *Miranda*.

B. *The Disbarment of Petitioner Under the Circumstances of This Case Was Arbitrary.*

Petitioner in no sense disputes the legitimacy of the State's interest in maintaining high standards of competence and character among the members of the bar; nor does he dispute, as Judge (later Mr. Justice) Cardozo stated in *People ex rel. Karlin* v. *Culkin*, 248 N.Y. 465, 471, 162 N.E. 487, 489, that an attorney becomes "an instrument or agency to advance the ends of justice."[15] Neither does he dispute that an attorney may be disciplined or disbarred if he is proven, in a proceeding consistent with the standards of the Fourteenth Amendment, not to have maintained the standards which the State imposes upon its attorneys. But this Court has long recognized that, however valid may be a state's interest in regulating the practice of law, the means used to effect that interest will be subjected to the strictest scrutiny when they operate to curtail federal constitutional rights. See *Railroad Trainmen* v. *Virginia Bar*, 377 U.S. 1; *NAACP* v. *Button*,

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[15] At the same time, we note that the *Culkin* case, from which the Court quoted in *Cohen*, see 366 U.S., at 124, 126-127, involved quite a different situation from that involved here. In *Culkin*, an attorney was imprisoned for contempt for refusal to testify or even to be sworn in a Judicial Inquiry, and the New York Court of Appeals upheld the contempt judgment. No claim of privilege against self-incrimination was involved, and Judge Cardozo posed the issue thus: "We are now asked to hold that, when evil practices are rife to the dishonor of the profession, [an attorney] may not be compelled . . . to say what he knows of them, *subject to his claim of privilege if the answer will expose him to punishment for crime.*" 248 N.Y., at 471, 162 N.E., at 489. (Emphasis added.)

We have already referred, at p. 28, *supra*, to the consistent position of the New York Court of Appeals prior to *Cohen* that an attorney's claim of the privilege against self-incrimination could not be a breach of any duty to the court, and that position has also been taken by the courts of other states. See, *e.g.*, *In re the Integration Rule of the Florida Bar*, 103 So. 2d 873; *In re Holland*, 377 Ill. 346, 36 N.E. 2d 543; but see *Brophy* v. *Industrial Acc. Commission*, 46 Cal. App. 2d 278, 115 P. 2d 835; *In re Fenn*, 235 Mo. App. 24, 128 S.W. 2d 657; see generally, Note, *The Privilege to Practice Law versus the Fifth Amendment Privilege to Remain Silent*, 56 N.W.U.L. Rev. 644 (1961).

371 U.S. 415; *Schware* v. *Board of Law Examiners*, 353 U.S. 232. As in other areas "[w]here there is a significant encroachment upon personal liberty, the State may prevail only upon showing a subordinating interest which is compelling," *Bates* v. *Little Rock*, 361 U.S. 516, 524, and the means "must be viewed in the light of less drastic means for achieving the same basic purpose." *Shelton* v. *Tucker*, 364 U.S. 479, 488.

It is, first of all, clear that the objective of a bar that adheres to the highest standards of ethical behavior, while important, is not of pre-eminent importance. It is not of the same order, for example, as the nation's need to preserve itself against foreign invasion, or internal subversion, or economic collapse. Indeed, the State's interest in a bar of high character is, we submit, of no greater importance than its interest in convicting those guilty of major crimes—an interest that by the explicit command of the Constitution is made subordinate to the Fifth Amendment. And it is not without significance that our system of law enforcement, while no more perfect than any other human institution, has operated quite satisfactorily in the almost two centuries since the Fifth Amendment was adopted.

As to the means here used by the State, what has been done, as the opinion of the Appellate Division makes clear, is to call attorneys before a secret investigation in which no charges are made against them and to require them to answer questions and produce all their financial records for examination. If such attorneys refuse to "cooperate" with these procedures under good faith claims of their privilege against self-incrimination, the State has an inflexible rule that they must be disbarred. The State's rationale for that inflexible rule is difficult to grasp. The Appellate Division's opinion appears to deny that any inference of guilt is drawn from the invocation of the privi-

lege, but at the same time it equates invocation of the privilege with a lack of candor and frankness. In the *Slochower* case, of course, the New York Court of Appeals even more clearly denied that any inference of guilt was drawn from Professor Slochower's invocation of the privilege, 306 N.Y. 532, 538, 119 N.E. 2d 373, 377, but this Court nonetheless held that such an inference was made "[i]n practical effect," 350 U.S., at 558, and it condemned unequivocally "the practice of imputing a sinister meaning to the exercise of a person's constitutional right under the Fifth Amendment." *Id.*, at 557; see *Grunewald* v. *United States*, 353 U.S. 391, 421. But that is exactly what was done by the State in this case. It gave a sinister meaning to petitioner's invocation of the privilege by finding therein a lack of candor and frankness which was found to be inconsistent with the duty of cooperation owed to the court.

If one accepts at face value the rationale of the Appellate Division, which was implicitly accepted by the Court of Appeals through its reliance upon *Cohen*, the State has created an absolute duty of attorneys to disclose information to the court, and it will not look behind the refusal to examine the reason. Thus, the duty is violated equally by one who refuses to cooperate merely on grounds of contumacy, by one whose refusal is based upon a good faith claim of the privilege against self-incrimination, and, possibly even by one who resists disclosure because it would involve privileged information obtained from a client. It is difficult to conceive of a more arbitrary procedure than to give undifferentiated treatment to these grounds for refusal to disclose information. Compare *Wieman* v. *Updegraff*, 344 U.S. 183. But if one looks behind the court's rationale, as we contend this Court can appropriately do, see pp. 27-28, *supra*, it appears that this absolute duty is newly created for the purpose of penalizing attorneys who, by exercising the privilege against self-incrimination,

put the Judicial Inquiry's staff to the task of developing independent evidence.

It cannot be denied, of course, that it is more efficient and simpler for the Judicial Inquiry to pursue its task through direct questioning of members of the bar, including both those who are suspected of unethical behavior and those who are not, than it is to develop independent evidence through less direct means. But the choice between greater efficiency of the State and the freedom of the individual was made long ago when the Bill of Rights was adopted. Where the protections of the Bill of Rights conflict with the efficacy of a system of law enforcement, it is the Constitution that must be respected and the system that must be modified to make it conform. *Escobedo* v. *Illinois*, 378 U.S. 478, 490: *Brown* v. *Mississippi*, 297 U.S. 278; see also *Entick* v. *Carrington*, 19 How. St. Tr. 1029, 1073-1074 (Ct. of Common Pleas).

The issue, however, is not whether it is simple or convenient for the State to insist upon relinquishment of the privilege but rather whether the State can manage to do without so drastic an invasion of a constitutional right and yet preserve the integrity of the bar. For where fundamental personal liberties are to be impaired the law or regulation must be shown "necessary, *and not merely rationally related*, to the accomplishment of a permissible state policy," *McLaughlin* v. *Florida*, 379 U.S. 184, 196 (Emphasis added.), and "a governmental purpose to control or prevent activities constitutionally subject to State regulation may not be achieved by means which sweep unnecessarily broadly and thereby invade the area of protected freedoms." *N.A.A.C.P.* v. *Alabama*, 377 U.S. 288, 307.

New York's own history, to which we refer at p. 28, *supra*, does not indicate that recognition and preservation of the privilege has resulted in any noticeable lowering of

the standards of the bar or in the extent to which those standards are generally observed.[16] Nor is there anything in the record to support the bald conclusion of the Appellate Division that the kind of "cooperation" demanded by that court of members of the bar is a necessary condition to the maintenance of the desired standards of conduct.

On the contrary, this record discloses that the State's investigation would have been hampered very little had it adhered to its earlier practice of recognizing that exercise of the privilege against incrimination is wholly consistent with an attorney's obligations to the court. Petitioner complied fully with the special rules of the Appellate Division requiring the filing of statements of retainer. Accordingly, the pleadings filed by him in actions before the courts and the statements of retainer filed by him gave detailed information as to his activities as an attorney, see p. 4, n. 2, *supra*, so that the State had but to take the time required for independent investigation in order to establish whether he had abused his right to practice. Beyond the facts of this case, it seems to us highly unlikely that there will be many instances in which exposure of unethical practices by an attorney will turn solely upon the ability of the State to compel his testimony, in the face of a claim that it would be incriminating. In short, "[N]o conflict exists between constitutional requisites and exaction of the highest moral standards from those who would practice law." *Willner* v. *Committee on Character*, 373 U.S. 96, 106 (concurring opinion of Goldberg, J.).

It is possible that instances will arise in which invocation of the privilege may make it more difficult for an ap-

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[16] The English practice appears historically to have accorded an attorney the right to refuse to give testimony in a disciplinary proceeding where the complaint against him involved an indictable offense, although he could be disbarred or cleared through independent evidence. See *Stephens* v. *Hill*, 10 Mee. & W. 28, discussed in *Ex Parte Wall*, 107 U.S. 265, 277.

plicant for a license or a governmental benefit to establish that he possesses the requisite qualifications. See *Konigsberg* v. *State Bar*, 366 U.S. 36; *cf. Kimm* v. *Rosenberg*, 363 U.S. 405. He must still be allowed the opportunity to establish those qualifications, however, because a refusal to supply information upon a claim of federal constitutional right cannot of itself constitute evidence of bad character. *Konigsberg* v. *State Bar*, 353 U.S. 252.[17] There may be reason, moreover, for permitting a state greater leeway when it is dealing with applicants for a license than when it seeks to withdraw a license long enjoyed and relied upon. It is one thing to say, for example, that a state need not, in processing the hundreds of annual applications for admission to its bar, maintain a staff of investigators to establish by independent evidence the lack of qualifications of applicants who withhold information upon constitutional grounds. It is quite another thing to say that one who has long since established his qualifications and practiced under a license from the state may be called upon to appear before a secret investigation and given the burden of disproving, in absence of any charges of wrongdoing, that he has not maintained the standards required of him. *Cf. Speiser* v. *Randall*, 357 U.S. 513. And it is still another thing to say that that burden is not mitigated in any sense by a good faith claim that disclosure

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[17] Of course, if denial of admission to practice law is a penalty within the standard of the Fifth Amendment, there is no room for examination of any countervailing interest of the State. We recognize, however, that, even if disbarment of one who has been admitted to practice is a proscribed penalty, arguably the refusal to admit one to practice is a lesser kind of compulsion. In any event, the *Konigsberg* cases presented a different issue from that presented here, since the refusals there were based upon First rather than Fifth Amendment grounds, and a majority of this Court has taken the position that "the protections of the First Amendment, *unlike a proper claim of the privilege against self-incrimination under the Fifth Amendment*, do not afford a witness the right to resist inquiry in all circumstances." *Barenblatt* v. *United States*, 360 U.S. 109, 126. (Emphasis added.)

might tend to subject him to incrimination. Indeed, it is in just this sort of proceeding that the Court has recognized the privilege to have its paramount justification, see *Grunewald* v. *United States*, 353 U.S. 391, 422-423, and it follows that it is in just this sort of proceeding where procedures inhibiting the exercise of the privilege are most arbitrary.

Americans today, with relatively inconsiderable exceptions, live upon what they earn and not what they own. To disbar a man who has practiced law for forty years, without complaint or reproach, when he has violated no valid law or regulation is, in the words of Mr. Justice Black in dissent in *Nelson* v. *Los Angeles County*, 362 U.S. 1, 10, a denial of due process "in its authentic, historical sense." The exercise of a constitutional right cannot be made the sole basis for denying a man the right to engage in the only profession for which he is qualified.

C. *Disqualification of Attorneys From the Exercise of a Privilege Guaranteed Other Citizens Is Invidious Discrimination.*

Even aside from the arbitrariness of the State's procedure on the grounds discussed above, the opinion of the Appellate Division attempts to create a classification under which petitioner as a citizen is entitled to exercise his privilege though he cannot do so as an attorney. That classification, of course, echoes the rationale of the New York courts and of this Court in the *Cohen* case. We contend, with all respect, that there can be no more invidious discrimination under the equal protection clause of the Fourteenth Amendment than to hold that an attorney, whose office is undertaken under an oath to support and defend the rights guaranteed by the Constitution and whose practice frequently may require him, in good faith, to

counsel clients to withhold information from the courts under that Constitution, is disqualified from exercising those rights for himself *because he is an attorney.* Compare *Takahashi* v. *Fish Comm'n,* 334 U.S. 410; *Truax* v. *Raich,* 239 U.S. 33. It is no answer to say that an attorney may be denied rights guaranteed to other citizens merely because his position is one of trust or because his status carries with it a duty of cooperation with the courts, since "a State cannot foreclose the exercise of constitutional rights by mere labels." *N.A.A.C.P.* v. *Button,* 371 U.S. 415, 429. Stripped of its trappings, the rationale for such a classification as between attorneys and other citizens is that, while the government may well tolerate a marginal standard of behavior from citizens in general, the much higher standards required of attorneys do not permit them to hide behind a constitutional privilege the function of which is to shelter those who have done wrong. But, as we have already shown, at p. 35, *supra,* this Court time and again has emphasized that no such view of the privilege against self-incrimination may be taken by the government, since "one of the basic functions of the privilege is to protect innocent men," *Grunewald* v. *United States, supra,* at 421, particularly in the circumstances in which it was invoked by petitioner. *Id.,* at 422-423; see also *Murphy* v. *Waterfront Comm'n,* 378 U.S. 52, 55-56. Thus, the classification of the State is left without rational justification on the basis of any peculiar status of petitioner as an attorney or because of any peculiar relationship between him and the Judicial Inquiry which sought to strip him of either his privilege or his profession.

Finally, a classification disqualifying attorneys from the exercise of a constitutional right while preserving that right for other citizens ignores a basic interest of society. As this Court stated in *Konigsberg* v. *State Bar,* 353 U.S. 252, 273, "[a] bar composed of lawyers of good character

is a worthy objective but it is unnecessary to sacrifice vital freedoms in order to obtain that goal. It is also important both to society and the bar itself that lawyers be unintimidated—free to think, speak, and act as members of an Independent Bar." Surely it would not be contended that the attorney's status strips him of his constitutional right to criticize the courts in good faith while others enjoy that right. Compare *Garrison* v. *Louisiana*, 379 U.S. 64, with *New York Times Co.* v. *Sullivan*, 376 U.S. 254; *cf. In re Sawyer*, 360 U.S. 622. It would be an equally unacceptable denigration of the privilege against self-incrimination if the states were free to determine that its exercise is consistent with the duties of a layman but not with those of an attorney.[18] There is, we submit, no rational basis that supports such a determination, and the State's action must fall as an invidious discrimination against attorneys prohibited by the equal protection clause of the Fourteenth Amendment.

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[18] As to the duty of cooperation which was owed to authority by English citizens in connection with the history of the privilege against self-incrimination:

> "[The Englishman] might owe to authority a duty to bear witness as to matters external to himself; but he could not be compelled to answer as to his own life: particularly his religious and political beliefs.
>
> "An Englishman's home was his castle; his life was his inviolable temple. Where his life, his freedom from official restraint, his beliefs and opinions were at issue, he was no longer a subject of the state. He himself was a sovereign. He had the sovereign right to refuse to cooperate; to meet the state on terms as equal as their respective strength would permit; and to defend himself by all means within his power—including the instrument of silence. He could rest on the presumption of innocence. He could put the state to its proof. The state and he could meet, as the law contemplates, in adversary trial, as equals—strength against strength, resource against resource, argument against argument. The duty to cooperate came to an end at the threshold of conflict between the state and the individual." Fortas, *The Fifth Amendment: Nemo Tenetur Prodere Seipsum*, 25 Cleve. B. A.J. 91, 98 (1954).

III. The Invalidity of Petitioner's Disbarment Is Not Affected by the State's Rule Requiring Attorneys to Keep Records.

A. *The Judgment May Not Be Affirmed Upon the Sole Ground That the Privilege Did Not Apply to Petitioner's Records.*

The Appellate Division explicitly recognized that petitioner had "an absolute right to invoke his constitutional privilege against self-incrimination and to refuse" to testify and to produce the records for which the subpoena called, but it held that he could nonetheless be disbarred for exercising that "absolute" right. In its memorandum order of affirmance, however, the Court of Appeals relied upon the *Cohen* case and "on the further ground that the Fifth Amendment privilege does not apply to a demand, not for oral testimony, but that an attorney produce records required by law to be kept by him. . . . [R.86]" Thus, the Court of Appeals reversed the Appellate Division's holding that the privilege was applicable to petitioner's refusal to produce records, although it agreed with the holding that the privilege applied to his refusal to testify.

Assuming *arguendo* that the Fifth Amendment privilege as to production of petitioner's records was removed by virtue of the so-called required records doctrine established in *Shapiro* v. *United States,* 335 U.S. 1, nothing in that doctrine would operate to remove the testimonial privilege, either in general or with reference to testimony about the required records. *Shapiro* v. *United States, supra,* at 27; *Curcio* v. *United States,* 354 U.S. 118.

Petitioner asserted both a testimonial and a documentary privilege before the Judicial Inquiry. The charge against him was a "refusal to answer questions and to produce the records" called for by the subpoena (R.7). The order of disbarment was entered "on the basis of the Referee's

unchallenged finding that [petitioner] refused to testify and to produce his record [R.83]." Thus it is clear from the order of the Court of Appeals, as well as its amended remittitur, that its affirmance of the disbarment order was based both upon petitioner's conceded right to refuse to testify and his refusal to produce his records. Otherwise reliance upon the *Cohen* case, which held that an attorney may be disbarred even for a refusal to testify based upon a *valid claim* of privilege would have been neither necessary nor appropriate.

If this Court accepts our previous argument that petitioner could not constitutionally be disbarred for his refusal to answer questions, then the fact that the disbarment order was also based in some inestimable degree upon an unprivileged refusal to produce records would not permit affirming the judgment below, which "must be affirmed as to both or as to neither." *Thomas* v. *Collins,* 323 U.S. 516, 529; see *Williams* v. *North Carolina,* 317 U.S. 287, 292; *Stromberg* v. *California,* 283 U.S. 359, 367-368; *cf. Jackson* v. *Denno,* 378 U.S. 368; *Fahy* v. *Connecticut,* 375 U.S. 85. Since the court below passed upon respondent's belated claim that petitioner's privilege did not apply to the so-called required records, however, and in order ultimately to resolve the controversy between the parties to this case, the Court may well believe it appropriate to resolve the question whether the record-keeping requirement of Rule 5 of the Appellate Division operated to remove the privilege from the records which petitioner refused to produce before the Judicial Inquiry. We contend that it did not, since the *Shapiro* case should be overruled for reasons discussed below, and since, even if there remains some validity to the required records doctrine, that doctrine does not apply to records involved here. Further, even if the Court rejects both of the above arguments, the judgment must be reversed under the doctrine of *Raley* v. *Ohio,* 360 U.S. 423.

B. *The Required Records Doctrine is an Unwarranted Limitation Upon the Scope of the Privilege Against Self-Incrimination.*

The required records doctrine, briefly stated, is that the Fifth Amendment privilege of an individual to refuse to produce his private papers may be removed by a governmental requirement that those papers be kept by him. Although the doctrine earlier had been approached by lower courts, see Note, *Quasi-Public Records and Self-Incrimination*, 47 Colum. L. Rev. 838 (1947), it was established and applied by this Court for the first—and last—time in *Shapiro* v. *United States*, 335 U.S. 1. There the Court held that the privilege did not apply to sales records required to be kept by food licensees under wartime regulations of the Office of Price Administration, since the records had lost their character as private papers and acquired "'public aspects.'" *Id.* at 34. The case involved a fruit and vegetable wholesaler licensed under the Emergency Price Control Act, 56 Stat. 23, who was tried on charges of making tie-in sales in violation of OPA regulations. He contended that, because he had produced, under subpoena, sales records required to be kept by him under OPA regulations and had been assured that he thus received the immunity which flowed from the immunity provisions of the Act, he could not be prosecuted for violations disclosed by the records. The Court, in a long opinion devoted to the interpretation of the immunity provisions of the Act, rejected his contention that the Act granted immunity to persons who produced records required to be kept by regulations under the Act. Noting that petitioner had not duly raised the question, 335 U.S., at 32, the Court then held that the Act was constitutional as thus construed. It assumed that "there are limits which the Government cannot constitutionally exceed in requiring the keeping of records

which may be inspected by an administrative agency and may be used in prosecuting statutory violations committed by the record-keeper," *ibid.*, but held that the bounds were not exceeded in that case.

The principal authorities relied upon by the court were *Wilson* v. *United States*, 221 U.S. 361, and *Davis* v. *United States*, 328 U.S. 582. The latter case involved a claim, rejected by the Court, that gasoline ration coupons introduced in evidence in a trial for unlawful possession of those coupons were the product of an unreasonable search and seizure. The Court found that the coupons were issued by the government under regulations providing that they did not become the property of the custodian but remained government property, subject to inspection and recall, and held, relying upon the *Wilson* case, that the custodian of public documents was not privileged under the Fifth Amendment to refuse to produce them, even though he might thereby be incriminated.

The *Wilson* case was decided shortly after *Hale* v. *Henkel*, 201 U.S. 43, which held that a corporation could not claim the privilege and that a corporate officer could not, therefore, resist production of documents on the ground that the corporation might be incriminated. *Wilson* extended this doctrine and held that a corporate officer has no Fifth Amendment privilege to refuse to produce the records of the corporation which are in his custody, even though they might incriminate him, since his mere custody does not make the corporation's papers his own and since the corporation has no privilege. Thus, the holding in neither *Davis* nor *Wilson* furnished any substantial support for the conclusion in *Shapiro* that the private records prepared by a non-corporate businessman for use in the conduct of his affairs can somehow be transformed into public documents—such as ration coupons issued by the government—or that the individual can be

transformed from an owner to a mere custodian—such as a corporate officer—by the simple expedient of an administrative regulation requiring that such records be kept.

The Court in *Shapiro* did not rely upon the holdings in either *Wilson or Davis*, however, nor did it base its decision upon any analysis of those cases. Rather, it relied upon a dictum from *Wilson*, 221 U.S., at 380, which was quoted later in *Davis*, 328 U.S. at 589-590, that "'the privilege which exists as to private papers cannot be maintained in relation to 'records required by law to be kept in order that there may be suitable information of transactions which are the appropriate subjects of governmental regulation and the enforcement of restrictions validly established.' " 335 U.S., at 33. A dissenting opinion in *Shapiro* made an exhaustive analysis indicating the inapplicability of the *Wilson* dictum, and of the English and state cases cited by the Court in *Wilson* in support of it, to the kind of records involved in *Shapiro*, see 335 U.S., at 58-62 (dissenting opinion of Frankfurter, J.), and we can add nothing to that analysis.[19] As Mr. Justice Frankfurter demonstrated, the dictum went far afield from the question actually decided in *Wilson*—that a corporate officer could not resist a government demand for production of corporate documents in his custody even though the documents might incriminate him. The Court in *Wilson* noted that Wilson's custody as an officer was subject to the control of the corporation and also that the directors had formally demanded possession from Wilson for the purpose of producing the

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[19] We do note, however, that the portion of the *Wilson* dictum quoted in *Shapiro* referred to a further application of the principle that, "in the case of public records and official documents, made or kept in the administration of public office, the fact of actual possession or of lawful custody would not justify the officer in resisting inspection. . . ." *Wilson* v. *United States*, *supra*, at 380. Petitioner is not, of course, a public official by virtue of holding a license from the State, see *Cammer* v. *United States*, 350 U.S. 399.

documents. 221 U.S., at 376, 385. Thus, the dictum was intended to show only that a custodian of documents to which another has a greater right of possession may not resist production on Fifth Amendment grounds when the owner, itself, may not resist production on those grounds.

The fundamental defect of *Shapiro*, however, lies not in the fact that it rested in large part upon a questionable dictum; rather, that defect lies in *Shapiro's* inconsistency with prior and subsequent cases decided by this Court and in the absence of any rationale for the doctrine which is consistent with the Court's recognition that the privilege is to be liberally rather than narrowly interpreted. As we have noted, the Court has not, since deciding *Shapiro*, explained or applied the doctrine established there, although the lower courts have applied the doctrine with conflicting results. See *Securities & Exchange Commission* v. *Olsen*, 354 F. 2d 166 (2d Cir.); *Russell* v. *United States*, 306 F. 2d 402 (9th Cir.); *United States* v. *Clancy*, 276 F. 2d 617 (7th Cir.), *reversed on other grounds*, 365 U.S. 312; *Beard* v. *United States*, 222 F. 2d 84 (4th Cir.), *cert. denied*, 350 U.S. 846; *United States* v. *Remolif*, 227 F. Supp. 420 (D. Nev.); *United States* v. *Ansani*, 138 F. Supp. 451 (N.D. Ill.).[20] Examination of the *Shapiro* rationale thus has been left largely to the commentators, who, while they have

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[20] One commentator relies in part upon the *Clancy* case in support of his contention that the federal government has been unwilling, in recent years, to test the *Shapiro* doctrine in this Court. See Edgar, *Tax Records, the Fifth Amendment, and the Required Records Doctrine*, 9 St. Louis L. J. 502, 507-508 (1965). In *Clancy*, 276 F. 2d., at 630-631, the Court of Appeals affirmed denial of a motion to suppress as to records required to be kept under the federal wagering tax laws and regulations thereunder, relying upon *Shapiro*, but this Court's reversal on other grounds led it not to reach petitioners' challenge to the court's holding. 365 U.S., at 316. The Edgar article notes that the United States, in its brief in opposition to the petition for certiorari, cited *Shapiro*, but in its brief on the merits it specifically disclaimed reliance on the Court of Appeals' position that the records involved were not protected by the Fifth Amendment privilege. See p. 53, n. 23, *infra*.

disagreed as to whether the doctrine should be wholly repudiated, almost uniformly have found that no logical rationale has been advanced in support of the doctrine. See, *e.g.*, Edgar, *Tax Records, the Fifth Amendment, and the Required Records Doctrine*, 9 St. Louis L. J. 502 (1965); Note, *Required Information and the Privilege Against Self-Incrimination*, 65 Colum. L. Rev. 681 (1965); Comment, 9 Stan. L. Rev. 375 (1957); Note, 68 Harv. L. Rev. 340 (1954); Meltzer, *Required Records, the McCarran Act, and the Privilege Against Self-Incrimination*, 18 U. Chi. L. Rev. 687 (1951).

The two possible bases for the required records doctrine, as for any doctrine inhibiting exercise of the privilege, see *Rogers v. United States*, 340 U.S. 367, 376-377 (dissenting opinion of Black, J.), are a broad application of the doctrine of waiver and a narrow interpretation of the scope of the privilege. The waiver theory is that an individual, by choosing to engage in an activity in which the government requires keeping and production of records, thereby waives his privilege as to such records. The Court in *Shapiro* did not apply the waiver analysis, perhaps because petitioner had no notice that he might be waiving his privilege but rather was led to believe that his production of records would confer immunity upon him. But in any event the proposition that the government may force a waiver of a fundamental personal liberty upon an individual as a condition of permitting him to engage in an occupation which requires a license from the government merely assumes the answer to the basic question which must be determined—whether the governmental coercion involved is inconsistent with the protection guaranteed by the privilege. *Cf.* Note, *Unconstitutional Conditions*, 73 Harv. L. Rev. 1595 (1960).

The arbitrary character of the waiver theory is particularly apparent in its application to this case. In order

to find that petitioner waived his privilege as to the records sought by the subpoena, one must say first that, by a rule enacted in 1940, the State could force petitioner either to waive his privilege against self-incrimination or abandon a profession in which he had engaged since 1926. Second, the waiver must be implied despite the absence of any notice in the rule that such a waiver was part of the record-keeping requirement and despite the fact that the New York Court of Appeals had previously rejected the position that a record-keeping requirement made inapplicable the State privilege against self-incrimination. See *People ex rel. Ferguson* v. *Reardon*, 197 N.Y. 236, 90 N.E. 829. Finally, the waiver must be found despite the fact that petitioner asserted his privilege before the Judicial Inquiry and was advised by the Presiding Justice that he had a perfect right to plead it. Thus, unless the elements of knowledge and voluntariness are wholly eliminated from the requirements for a valid waiver, the theory cannot apply to petitioner. See *Miranda* v. *Arizona*, 384 U.S. 436, 475-476; *Stevens* v. *Marks*, 383 U.S. 234.

The *Shapiro* case, however, was not based upon a broad waiver doctrine but rather upon the second technique for reducing the protection of the privilege. The scope of the privilege was defined to exclude, as not private or personal in character and thus not within the privilege, documents required by law to be kept by individuals.[21] The full extent

[21] The waiver theory may have been the basis of the Court's rejection of Fifth Amendment claims in a closely related area but under different circumstances. In *United States* v. *Kahriger*, 345 U.S. 22, and *Lewis* v. *United States*, 348 U.S. 419, the Court upheld federal wagering tax statutes which require registration with the government and payment of an occupational tax as a condition precedent to accepting wagers, holding that the requirements must be met before any incriminating acts are committed and the privilege protects only disclosure of past acts. In *Costello* v. *United States*, No. 41, OT 1966, the Court has granted certiorari limited to the question whether the *Kahriger* and *Lewis* cases should be overruled. 383 U.S. 942.

to which the Fifth Amendment privilege has been deprived of its force depends upon the nature of the limits upon governmental power to which the Court referred but which it did not explain in *Shapiro,* 335 U.S., at 32. Under a broad reading of *Shapiro* any kind of document prepared by a private individual which would reasonably aid in the enforcement or administration of a legitimate governmental regulatory program may be required to be kept by that individual *and* may thus be deprived of the protection of the Fifth Amendment privilege. But the potential limitation upon the scope of the privilege, while great at the time *Shapiro* was decided, is constantly expanding as the area of individual activity which is outside the bounds of governmental regulatory power decreases. And when it is realized how pervasive federal and state regulation has become and how few activities may be carried on without a license of some sort, with an accompanying record-keeping requirement, it becomes evident that if the doctrine is allowed to stand, "there is little left to either the right of privacy or the constitutional privilege." *Shapiro* v. *United States,* 335 U.S., at 10 (Frankfurter, J. dissenting). The record-keeping requirements imposed upon the public by the federal government alone are contained in a digest which comprises 68 pages, plus a 14 page index. See 31 Fed. Reg. 4000-4085 (March 8, 1966), revising 1 C.F.R. Appendix A. The digest states, moreover, that it excludes various types of requirements, see 31 Fed. Reg., at 4002.

We do not contest that the privilege applies only to private and not public documents, but the characterization of required records as not private cannot be harmonized with the definition of "private" as recognized in *Boyd* v. *United States,* 116 U.S. 616, which established that private papers are protected by the privilege. The document which the Court in *Boyd* held privileged against compulsory production was an invoice of certain cases of glass which had been

imported into the country. Just as in *Shapiro*, the document was prepared by a private businessman for use in his business; just as in *Shapiro*, the business involved was one which was regulated by the federal government; and, in a sense indistinguishable from *Shapiro*, the document was a "required record."[22] But the distinction in *Boyd* between private papers and those which were without the protection of the Fourth and Fifth Amendments did not relate to mere governmental requirements that documents relating to a business regulated by the government be kept and produced. *Boyd* regarded the protection of the privilege as withheld only with respect to items which the government was entitled to seize and possess, such as stolen property and excisable articles. 116 U.S., at 623-624.

The Court in *Shapiro* could, of course, have overruled *Boyd*, but it did not purport to do so and the continued vitality of *Boyd*, as "one of the greatest constitutional decisions of this Court," has generally been accepted. *Schmerber* v. *California*, 34 U.S. L. Week 4586, 4591 (June 20, 1966) (dissenting opinion of Black, J.); see *id.*, at 4588.

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[22] The government in *Boyd* had sought compulsory production of the invoice under Section 5 of the Act to amend the customs-revenue laws and to repeal moieties, 18 Stat. 187, which provided as follows:

> "That in all suits and proceedings other than criminal arising under any of the revenue laws of the United States, the Attorney representing the government, whenever, in his belief, any business-book, invoice, or paper, belonging to or under the control of the defendant or claimant, will tend to prove any allegation made by the United States, may make a written motion . . . and thereupon the court . . . may, at its discretion, issue a notice to the defendant or claimant to produce such book, invoice, or paper in court. . . ."

Sections 9 and 10 of the same Act prohibited the entry into the United States of any foreign goods valued in excess of $100 "without the production of an invoice thereof as required by law" or an affidavit showing why such invoice could not be produced and showing the actual cost or foreign market value of the goods. 18 Stat. 188. For a discussion of the history of the above statutory provisions and the administrative regulations relating to invoices at the time *Boyd* was decided, see Mr. Justice Frankfurter's dissenting opinion in *Shapiro*, 335 U.S., at 68, n. 19.

Therefore *Shapiro* stands as a grave departure from *Boyd* and an unwarranted limitation upon the scope of the privilege as delimited in *Boyd,* and also as inconsistent with the Court's previous and subsequent injunctions that the privilege is to be interpreted broadly. See *Miranda* v. *Arizona,* 384 U.S. 436, 461, and cases there cited.

Shapiro moreover, is inconsistent with this Court's recent decision in *Albertson* v. *SACB,* 382 U.S. 70, which held unconstitutional, as inconsistent with the Fifth Amendment privilege, a federal statute and orders thereunder requiring the completion and filing with the government of registration statements by members of the Communist Party. The Court cited cases in which it had held that witnesses could not be compelled to testify as to Communist Party membership or association and held that, "if the admission cannot be compelled in oral testimony, we do not see how compulsion in writing makes a difference for constitutional purposes." *Id.,* at 78. That holding in itself is inconsistent with *Shapiro,* which established just such a constitutional difference between compelling oral testimony and compelling documentary evidence. 335 U.S., at 27.

Shapiro found that the Fifth Amendment privilege did not prohibit a requirement that an individual produce for government inspection documents which would incriminate him, because "there is a sufficient relation between the activity sought to be regulated and the public concern so that the Government can constitutionally regulate or forbid the basic activity concerned, and can constitutionally require the keeping of particular records, subject to inspection by the Administrator." 335 U.S., at 32. Putting aside the fact that this analysis ignores the critical distinction between the power to require records to be kept and the power to deprive those records of the protection of the Fifth Amendment, the situation in *Albertson* appears

clearly to fall within this rationale. The Court in *Communist Party* v. *Control Board*, 367 U.S. 1, 88-103, established both the extensive power of Congress to regulate the activities of the Communist Party and the reasonable relationship of registration and disclosure requirements to the interests sought to be protected through that regulation. The Court in *Albertson*, however, held that registration by individuals could be required only if the government supplanted the privilege by immunity which supplied a complete protection against all the perils against which the privilege guarded. Thus, unless there is some constitutional difference between requiring the keeping of records which must be surrendered upon the government's call and requiring the filing of reports with the government, the decision in *Albertson* must be regarded as a conflict with *Shapiro* which justifies explicit overruling of that case.[23]

It may be argued that repudiating the required records doctrine would interfere with the regulatory programs of the federal and state governments. The short answer to that argument, of course, is that the Fifth Amendment privilege is not to be weighed against countervailing interests. It is a right which "cannot be abridged." *Miranda* v. *Arizona*, 384 U.S., at 479. Even if such a consideration were relevant,

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[23] We are able to find no difference for purposes of the Fifth Amendment privilege between such a record-keeping requirement and a report-filing requirement, and we note that the government in the *Shapiro* case found no such distinction:

> "The weakness of petitioner's argument would be even more clearly demonstrated if, as is conventional under many types of federal and state regulations, he had been required by law to file periodic reports. . . . His argument here would logically drive petitioner to the untenable contention that such reports could not be utilized by the Administrator without clothing petitioner with an immunity from prosecution for offenses disclosed by the reports. Regulations permit records to be retained, rather than filed, largely for the convenience of the persons regulated." Brief for the United States, p. 20, n. 7.

We also note, however, that the government's brief in *Albertson* did not cite the *Shapiro* case.

however, it is unlikely that repudiation of the doctrine would impair in any substantial way the administration or enforcement of regulatory programs. Subject to the requirements of other constitutional provisions, the government could still require the keeping of records, and such records could be withheld from production only by natural persons who chose to claim the privilege and as to whom the government was unwilling to grant immunity. There would be no effect upon the principal subjects of regulatory programs, since corporations and unincorporated associations such as labor unions and partnerships are not entitled to claim the privilege. See *Wilson* v. *United States*, 221 U.S. 361; *United States* v. *White*, 322 U.S. 694; *United States* v. *Silverstein*, 314 F. 2d 789 (2d Cir.), *cert. denied*, 374 U.S. 807.

C. *Assuming the Required Records Doctrine Retains Some Validity, the Doctrine Does Not Apply to the Records Involved in This Case.*

Should the Court reject our argument that the required records doctrine must be repudiated entirely through overruling the *Shapiro* case, the Court's recent decisions establishing the fundamental values reflected in the privilege and the broad, liberal application which it must be given require at least that the doctrine be construed very narrowly and limited in its application to substantial governmental interests which can be effected through no means other than a restriction of the scope of the privilege. See Comment, 9 Stan. L. Rev. 375 (1957); Note, 68 Harv. L. Rev. 340 (1954); compare *Aptheker* v. *Secretary of State*, 378 U.S. 500, 508; *Shelton* v. *Tucker*, 364 U.S. 479. In light of the *Albertson* case, it is difficult to conceive of the kinds of cases that would fall within the limits of a required records doctrine that is so narrowly confined, but it is apparent that this case cannot be within such limits. As we have pointed out previously, the State has made no showing that produc-

tion of the documents called for in the subpoena is essential, or indeed even necessary, to the enforcement of the standards of the Kings County bar and that the information already available through pleadings and statements of retainer is not adequate to permit the Judicial Inquiry to establish any wrongdoing through investigation and development of independent evidence.

This case differs from *Shapiro* both in the type of activity involved and in the type of records required to be kept. *Shapiro* dealt with a complex, nationwide system of price controls affecting varying industries and commodities with varying methods of operation. This case involves the standards of ethics to be maintained by attorneys practicing in a limited class of cases in the Second Judicial Department of the State of New York. Thus, the factors which might justify a partial limitation of the privilege in *Shapiro* because of the complexity, character and broad geographic application of the regulatory scheme involved, and a consequent frustration of enforcement in the absence of requiring keeping and production of records, are not present in this case. At the same time, the record-keeping requirements in *Shapiro* were comparatively narrowly drawn. Thus the Court in that case emphasized that the record involved there was a sales record which "recorded" a transaction in which the petitioner could engage solely by virtue of a license granted under the statute which required the records to be kept, 335 U.S., at 35, and the government's brief noted that the petitioner was not required to keep records of his private affairs or his other business affairs but was required solely to "keep and make available for inspection records relating to the prices at which he sold price-controlled fruits and vegetables." Brief for the United States, p. 13. In contrast, the records sought here serve no recording function. That function had already been fulfilled by other documents filed by petitioner apart from

the requirements of Rule 5. Rule 5, as implicitly interpreted by the Court of Appeals through its application of the required records doctrine to the documents sought in the subpoena, includes petitioner's day book, cash receipts book, cash disbursements book, check book stubs, petty cash book and vouchers, general ledger and journal, cancelled checks and bank statements, pass books and other evidences of accounts, record of loans made, payroll records, and state and federal tax returns and work sheets relative thereto. Thus, the State's record-keeping requirement is not narrowly limited to the precise area in which it has a legitimate interest but rather "sweep[s] unnecessarily broadly and thereby invade[s] the area of protected freedoms" under the Fifth Amendment. *N.A.A.C.P.* v. *Alabama*, 377 U.S. 288, 307. We contend that, even if *Shapiro* retains some validity, it should not be extended to cover the type of records required to be produced here.

D. *Affirmance of the Judgment on the Ground That Petitioner Had No Privilege to Refuse to Produce His Records Would Be a Denial of Due Process of Law.*

Even if *Shapiro* is valid and applicable to the records involved here, affirmance of the judgment on the ground that petitioner had no privilege to refuse to produce his records would be violative of the due process clause of the Fourteenth Amendment, in light of the procedure followed in this case. As we have stated, petitioner had no notice until after the close of the hearings before the Judicial Inquiry and the hearing before the referee that the State might contend that he had no privilege to refuse to produce his records. The Presiding Justice at the Judicial Inquiry had advised him, with no objection from the State, that the privilege did apply, and, while respondent later raised the issue of applicability of the privilege, the Appellate Division held that the privilege did apply. Apart from

any notice from the courts or respondent, petitioner had no notice from the opinions of any of the courts in the *Cohen* case that the privilege did not apply to production of records, though *Cohen* involved a refusal to produce records as well as a refusal to testify. See 366 U.S., at 120. Further, the controlling New York law established that, notwithstanding a requirement that records be kept, the privilege applied to such records. *People ex rel. Ferguson* v. *Reardon,* 197 N.Y. 236, 90 N.E. 829. And finally, a comparison between the documents called for by the subpoena and the documents required by Rule 5 would have made it apparent, even to the most cautious attorney concerned with adherence to a broad *Shapiro* doctrine, that he was not being asked to produce the documents required to be kept since the subpoena reached much further. Compare *Hubner* v. *Tucker,* 245 F. 2d 35 (9th Cir.).

Thus, until the Court of Appeals' decision, petitioner had been led to believe that he faced disbarment only as a consequence of his refusal to relinquish a valid claim of the privilege against self-incrimination under a decision which was specifically discredited by *Malloy* v. *Hogan,* 378 U.S. 1, 11. But the Court of Appeals, in an implicit construction of Rule 5 which broadened its application far beyond the language of the rule, held that petitioner had no privilege at all with respect to the records which the State sought to coerce him to produce under pain of disbarment. The procedure here is strikingly similar to that in *Raley* v. *Ohio,* 360 U.S. 423, in which the agency before which the appellants appeared advised them that they had a right to rely upon the State privilege, after which the State Supreme Court held that they were not protected by the privilege and thus had committed an offense in refusing to answer the questions put to them. To sustain the judgment here would be to sanction the same "indefensible sort of entrapment by the State" which the Court refused

to sustain in *Raley* as inconsistent with the requirements of the Fourteenth Amendment. *Id.*, at 426; see also *Stevens v. Marks*, 383 U.S. 234.

Conclusion

For the reasons discussed above the judgment of the Court of Appeals of the State of New York should be reversed.

Respectfully submitted,

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